SUPREME COURT, U. S. Nos. 74-233 and 74-234

Supreme Court, U.S.
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ROUAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD, et al,

THE COMMONWEALTH OF VIRGINIA, et al,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD, et al,

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, CITY OF CHICAGO, BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF WAYNE, MICHIGAN, CITY OF DETROIT, AND GREATER DETROIT CHAMBER OF COMMERCE,

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Chicago Association of Commerce and Industry; City of Chicago; Board of County Road Commissioners of the County of Wayne, Michigan; City of Detroit;[1] and Greater

[1] City of Detroit was a respondent in the Court of Appeals through the Detroit Aviation Commission, a department of the City of Detroit.

Detroit Chamber of Commerce, respondents below, submit the following brief in opposition to the petitions for a writ of certiorari filed by Department of Transportation of the State of Maryland (Maryland), and jointly by the Commonwealth of Virginia (Virginia) and the Metropolitan Washington Board of Trade.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 498 F.2d 129 and appears in the joint appendix to the petitions herein (JA), pages 2a-13a. The orders and opinions of the Civil Aeronautics Board appear in the joint appendix, pages 86a-135a.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the orders of the Civil Aeronautics Board, prescribing a mileage formula of air cargo rates between certain United States gateways and European points to eliminate undue preference and prejudice found to exist as between New York, on the one hand, and Baltimore-Washington, Philadelphia, Boston, Chicago, Detroit, and Cleveland, on the other hand, are within the statutory authority of the Board, are supported by adequate findings based upon substantial evidence of record, and have a rational basis in fact and law.

STATUTES INVOLVED

Federal Aviation Act of 1958:

Section 404(b), 49 U.S.C. §1374(b):

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference

or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 1002(f), 49 U.S.C. §1482(f):

> Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier or foreign air carrier for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may alter the same to the extent necessary to correct such discrimination, preference, or prejudice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare, or charge or enforcing any such discriminatory, preferential, or prejudicial classification, rule, regulation, or practice.

STATEMENT OF THE CASE

On March 13, 1969, the Civil Aeronautics Board (the Board), upon complaint of the City of Baltimore, entered into an investigation to determine whether or not the trans-Atlantic air-cargo rate structure was unduly preferential to New York and unduly prejudicial to Baltimore-Washington. The investigation was subsequently broadened to include a determination of whether such undue prejudice in rates also extended to Philadelphia, Boston, Chicago, Detroit, and Cleveland. Among the parties intervening in the investigation were the Chicago and Detroit parties filing this brief.

The trans-Atlantic air-cargo rate structure was prescribed by resolutions of the International Air Transport Association (IATA), which consists of the foreign flag air carriers serving the United States and all United States flag carriers serving Europe except Seaboard World Air Lines. Between 65 percent and 85 percent of all trans-Atlantic cargo tonnage moves under specific commodity rates. The remainder of such tonnage moves under general commodity rates or container rates. All of the cities which were parties to the proceeding are points which are authorized to receive non-stop service to and from Europe on the certificates of one or more of the air carriers, and all were receiving direct single-plane service to and from points in Europe at the time of the investigation. (JA, pp. 22a-24a, 91a)

When the Board instituted its investigation, however, the trans-Atlantic air-cargo rate structure did not reflect the direct service actually being rendered to and from Europe from and to all of the cities who were parties to the proceeding. General commodity rates to and from cities other than New York were constructed by the use of arbitraries or add-ons to the New York-London base rate. Specific commodity rates were published as through rates to New York from all European points to which the rate applies and other United States cities were able to take advantage of these rates only by combining therewith the lowest available domestic rate or combination of rates from the city in question through New York. The IATA carriers published arbitraries to be added to the New York-European point base rates for the cities of Philadelphia, Baltimore and Washington. The net result of this trans-Atlantic air-cargo rate structure was that rates per-mile to and from New York were appreciably lower than rates per-mile to and from other U.S. cities receiving direct-plane service to and from Europe. (JA, pp. 91a-92a)

Upon consideration of the evidence and the briefs and arguments of the parties thereto, the Board found that the rates under investigation were unduly preferential of New York and unduly prejudicial to the other cities, and it ordered the carriers to remove such undue preference and prejudice by establishing rates based on a mileage formula, structuring the rates on the New York-European rate per-mile as applied to the direct mileage between the European point and the American point involved. (JA, p. 90a)

In so ordering, the Board modified the initial decision of its administrative law judge who had heard the case. He, too, had found that the existing trans-Atlantic air-cargo rates unduly preferred New York and unduly prejudiced the other cities, but he would have removed such preference and prejudice by establishing the same air-cargo rates on trans-Atlantic traffic to and from New York, Baltimore-Washington, Philadelphia and Boston (i.e., by establishing common rating at such points) and by structuring trans-Atlantic air-cargo rates to and from Chicago, Detroit and Cleveland by establishing combinations over New York, adding to the European-New York rates a factor based upon the mileage between the interior cities and New York at the New York-London rate per mile. (JA, pp. 71a-72a, 90a) This would not have given Chicago and Detroit the benefit of their direct air mileage. One reason why the Board rejected Judge Cusick's solution is that "common rating would not eliminate the inequities in the North Atlantic freight rates, but would merely create a new set of preferences and prejudices" (e.g. as between Baltimore-Washington, on the one hand, and Detroit and Chicago on the other). (J.A. pp. 106a-107a)

The Maryland and Virginia parties sought review of the Board's orders in the Court of Appeals for the Fourth Circuit. That court affirmed the orders.

ARGUMENT

I.

NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED

While this is the first case to reach this court involving undue preference and prejudice in air-cargo rates under section 404(b) of the Federal Aviation Act of 1958 (Aviation Act), the petitions raise no important questions of federal law warranting review by this court. Only the routine inquiries in this type of case are presented: Whether the Board acted within the scope of its authority and whether its orders are supported by adequate findings based upon substantial evidence and have a rational basis in fact and law. The Court of Appeals considered those questions and in a well-reasoned opinion found petitioners' arguments to be without merit. (JA, p. 5a)

Petitioners present nothing to this court that was not presented to, and considered by, the Court of Appeals. Petitioners are simply dissatisfied with the manner in which the Board removed the undue preference and prejudice found to exist. The thrust of petitioners' arguments is that Baltimore-Washington should be common-rated with New York, notwithstanding New York is 190 miles closer to European cities than Baltimore-Washington. Administrative Law Judge Cusick, who heard the case, agreed with the Maryland and Virginia parties on that point, but the Board did not adopt his recommendation, for reasons which it thoroughly explained. Petitioner Maryland states (Pet., p. 5):

> Petitioner sought unsuccessfully in the court below and seeks here, to reinstate the remedy adopted by Judge Cusick.

In similar vein, petitioner Virginia states (Pet., p. 2) as its first question for review:

> Whether the . . . Board . . . should have removed the unlawful preference and prejudice and protected the competitive interests of ports and shippers by equalizing the rates at those competing ports.

Clearly such questions do not present any important question of federal law and do not warrant review by this court. Courts will not substitute their judgment for that of the agency on matters within the discretion of the agency. Particularly is this true when a court is asked to review an agency's fashioning of discretionary relief. *Manufacturers Ry. Co.* v. *United States,* 246 U.S. 457; *Virginian Ry.* v. *United States,* 272 U.S. 658, 663; *Georgia Commission* v. *United States,* 283 U.S. 765, 775; *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 619-621.

Petitioner Maryland states (Pet., p. 2) that the question presented is—

> Whether, having found that the shippers of air freight in Maryland directly compete with those in the New York area for European business, the Civil Aeronautics Board must as a matter of law require equal rates between both areas and Europe.

Although framed as if this were a legal question, petitioner points to no statutory language, court decisions, or other facts to support an argument that the Board is required "as a matter of law" to disregard distance and service and common-rate Baltimore-Washington with New York. Instead, as it itself states, it simply argues that the Board should have adopted a different remedy, i.e., the one favored by Judge Cusick, for eliminating the undue preference and prejudice found to exist.

There is nothing in sections 404(b) or 1002(f) of the Aviation Act which would limit the discretion of the Board as to the manner of removing undue preference and prejudice or require it to adopt any particular remedy, such as common-rating, in this case. Nor, as we show in the following sections of this brief, are there any court decisions which would require the Board to common-rate Baltimore-Washington with New York as a matter of law. Although this is the first case to reach this court involving air cargo rates under section 404(b), that section is patterned almost word for word on section 3(1) of the Interstate Commerce Act, enacted in 1887, and hundreds of cases involving that section have been before the courts. Many of the leading decisions of this court have involved that section, but not a single decision of this court can properly be relied on as authority for the proposition that section 404(b) of the Aviation Act requires common-rating of Baltimore-Washington with New York as a matter of law.

II.

THE DECISION BELOW IS CLEARLY CORRECT

After full consideration of all petitioners' arguments, which arguments are simply repeated here, the Court of Appeals found (JA, p. 5a) that "the Board did not exceed its statutory authority or act arbitrarily or unreasonably in prescribing the mileage rate".

Petitioners' argument that common-rating of Baltimore-Washington with New York is required as a matter of law depends on the premise that anything other than common-rating is unduly prejudicial to Baltimore-Washington as a matter of law. Such an argument flies directly in the face of the decisions of this court. Like section 404(b) of

the Aviation Act, section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1), prohibits undue preference and prejudice, but does not specify what particular facts or circumstances are essential to the existence thereof. What those circumstances are is left to the agency to determine. It was so held in *United States* v. *Trucking Co.*, 310 U.S. 344, 353:

> . . . the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination.

What shall be determined to be undue prejudice and preference is a question of fact, not of law. *Interstate Commerce Comm'n* v. *Alabama Midland Ry.*, 168 U.S. 144, 170; *Texas & P. R. Co.* v. *Interstate Commerce Comm'n*, 162 U.S. 197, 219; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 593. Whether rate disparities are justified by differences in circumstances and conditions or whether they are not is for the agency to decide. *Barringer & Co.* v. *United States*, 319 U.S. 1, 7; *New York* v. *United States*, 331 U.S. 284, 347; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 593; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482.

In determining whether the rates under investigation resulted in undue preference and prejudice, the Board followed substantially the same criteria as those followed by the Interstate Commerce Commission (ICC).[2] It found (JA, pp. 92a-93a):

> The parties do not dispute that a *prima facie* case of undue preference and prejudice is established upon a

[2] Cf. *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 830-831.

> showing: first, that the traffic moves under a rate structure which prejudices one party while preferring another; second, that a competitive relationship exists between the prejudiced and preferred parties; third, that the preference and prejudice is of an undue character; and fourth, that such preference and prejudice has resulted in economic injury to the prejudiced party.

The Board found the existence of these elements. It found the existence of significantly higher per-mile rates to and from the other gateways (including Chicago and Detroit) than to and from New York (JA, p. 95a). It found the existence of competition between the other gateways and New York and that the rate disparities had contributed to the diversion of traffic to New York (JA, p. 99a). It found that the carriers had failed to justify the disparities in the rates (JA, p. 99a).

Having properly found the existence of undue preference and prejudice, the Board elected to remove it by putting New York and all interior gateways on the same rate per-mile, using the existing rate between the European point and New York as a basis. It found (JA, p. 100a):

> Where the Board has found direct service to be in the public interest, the rate structure should reflect the availability of those services. Carriers not providing direct service cannot be permitted to deny the shipping public the benefits accruing from the direct services provided by other carriers.

The Board's method of removing the undue preference and prejudice was explained as follows (JA, pp. 104a-105a):

> We are in agreement with those who except to common-rating. We find that the existing preference and prejudice ought to be removed by requiring respondent carriers to file tariffs providing rates equal on a

> per-mile basis, for both specific commodity rates, container rates, and general commodity rates, to and from all gateway points at issue in this proceeding, and points in Europe.

In support of its prescription of mileage-based rates, it found (JA, p. 111a):

> Since costs tend to vary with miles flown, basing rates upon mileage will produce a more cost-based rate structure than either the current system or common rates. In addition, mileage-based rates preserve to each gateway the relative advantages of its geographic location.

It also found that "basing rates upon mileage at a rate per mile will eliminate the cause of the undue preference New York is currently receiving." (JA, p. 111a)

The Board thoroughly considered petitioners' arguments that Baltimore-Washington should be common-rated with New York, but rejected that contention, among other things for the reason that common-rating "would create a new set of preferences and prejudices" (JA, pp. 106a-107a), and found (JA, p. 108a) that there was—

> . . . nothing in the record which would justify imposing a rate structure which would provide lower per-mile rates to Philadelphia, Baltimore and Washington than to the other gateways and which at the same time would require a rate increase at all points in order to prevent the lowered yields from adversely affecting carriers' earnings.

Since undue preference and prejudice result from rate disparities which do not properly reflect transportation conditions, it is difficult to imagine how requiring mileage-based rates could be said to be an irrational method of removing such preference and prejudice.

We submit that the relief fashioned by the Board is within its discretion, is eminently rational, and is fully in accord with a long line of precedents under section 3(1) of the Interstate Commerce Act, and that the reasons for its action were fully explained by the Board. Whether the Board might also have been justified in common-rating Baltimore-Washington with New York, or whether this court, had it been sitting in the Board's place, would have adopted such common-rating are not relevant inquiries here.

III.

THERE IS NO CONFLICT OF DECISIONS

No case decided under section 3(1) of the Interstate Commerce Act cited in either petition is authority for the argument that the Board is required to common-rate Baltimore-Washington with New York as a matter of law. As the Court of Appeals correctly noted (JA, p. 8a, n. 6), the ICC has given full recognition to distance as a significant factor supporting differences in rates. All cases there cited were port cases. There are many others. This is not to say that the ICC has not, in individual cases, approved or required equalization, but this has *never* been done as a matter of law, only upon the facts of individual cases.

Nevertheless, petitioner Virginia argues (Pet., pp. 11, 15) that the decision below conflicts with *Boston and Maine Railroad* v. *United States,* 202 F. Supp. 830, affirmed by an equally divided court, *Baltimore & O. R. Co.* v. *Boston & M. R. Co.,* 373 U.S. 372, and *New York* v. *United States,* 331 U.S. 284.

In the *Boston and Maine* case, a three-judge district court set aside an ICC order finding that certain rates voluntarily established by the carriers to equalize compet-

ing ports were unduly preferential and prejudicial. The reasons why the order was set aside are complex and are stated in the opinion, but petitioner misstates the holding in the case when it says that the court "required the rates between competing ports to be common rated". Nothing in the opinion so holds, and neither the ICC nor, to our knowledge, any court has so construed that opinion. As the ICC said, in *Paper, Central Territory to North Atlantic Ports,* 329 I.C.C. 281 (1966), 291,

> We decline . ... to attribute to the decision in *Boston and Maine Railroad* v. *United States, supra,* any principle of absolute equalization between ports.

In that case, in fact, the ICC refused to permit equalization of rates on paper to other north Atlantic ports with those to Baltimore, the distance-favored port.

Further, the *Boston and Maine* case involved a voluntary attempt by the carriers to equalize rates and did not involve forced equalization. See 202 F. Supp. at 837. Here no carrier desires voluntarily to equalize Baltimore-Washington with New York, as the Board recognized (JA, p. 106a). The question here is whether the carriers should be compelled to disregard substantial differences in distance, an entirely different situation.

In *New York* v. *United States,* this court upheld the ICC's orders in *Class Rate Investigation, 1939,* 262 I.C.C. 447, 264 I.C.C. 41. In that case the ICC had under investigation all classification descriptions and related class rates throughout all the United States east of the Rocky Mountains. It found the existing rates and classifications to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act as well as unduly preferential and prejudicial in violation of section 3(1). 262 I.C.C.

at 700-701. It found that class rates throughout this area should be uniform. Utilizing its power to prescribe rates under section 15(1) of the Act, it prescribed a scale of mileage-related rates to be applied uniformly throughout the area.

Petitioner Virginia attempts to take certain portions of this court's opinion in *New York* v. *United States* out of context when it asserts (Pet., p. 15) that this court held that "the charge of a higher rate to one shipper than another for an equal number of miles of transportation constitutes discrimination." The ICC did not hold in that case, nor did this court, that merely charging one shipper a higher rate than it charged another for the same number of miles constitutes discrimination. The ICC has always required the showing of a competitive relationship as one essential element of undue preference and prejudice under section 3(1) of the Interstate Commerce Act. See *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 831.

In no way is the Board's decision here contrary to *New York* v. *United States*. Petitioner's argument that the Board did not eliminate all the outstanding preference and prejudice is based on a comparison of unrelated rates having no common origins or destinations or any proven competitive relationships. The Court of Appeals properly called this a comparison of "apples with oranges." (JA, p. 12a) This, of course, is not to say that the situation to which petitioner refers is necessarily proper or justified. The point is that that situation cannot militate against the validity of the orders here involved. The Board's doors are always open to parties who may have a complaint on that score.

CONCLUSION

We submit, for the reasons above stated, that these petitions present no important questions of federal law, that the decision below is clearly correct, and that there is no conflict of decisions. The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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